83-2149

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

EDWARD DOBREFF and BARBARA DOBREFF,
his wife, Jointly and Severally,
Appellants,

v.

TOWNSHIP OF HARRISON, a Michigan
municipal corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF MICHIGAN

JURISDICTIONAL STATEMENT
-- STATE CIVIL CASE

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QUESTIONS PRESENTED

IS THE HARRISON TOWNSHIP SEWER ORDINANCE, ARTICLE 2, NO. 14 §4, AND MCLA §§333.12753-54 INVALID AS BEING REPUGNANT TO 33 USCA §1311 OF THE WATER POLLUTION PREVENTAL AND CONTROL ACT AND MICHIGAN'S ENVIRONMENTAL PROTECTION ACT M.C.L.A. §691.1203 BY REQUIRING APPELLANTS, EDWARD DOBREFF AND BARBARA DOBREFF AND OTHER PERSONS WITHIN THIER JURISDICTION CONNECT TO AND DISPATCH SEAAGE INTO THE DETROIT SEWAGE SYSTEM WHICH IS DISCHARGING POLLUTANTS INTO THE NATION'S NAVIGABLE WATERS AT LEVELS ABOVE LEVELS AUTHORIZED BY THE FEDERAL DISCHARGE PERMIT?

IS THE TRIAL COURT'S DECISION INTERPRETING M.C.L.A. §691.1203 REPUGNANT TO 33 U.S.C.A. §1311 OF THE WATER POLLUTION PREVENTION AND CONTROL ACT BY GRANTING SUMMARY JUDGMENT ON THE GROUNDS THAT APPELLANTS COULD NOT MAKE OUT A PRIMA FACIE CASE DESPITE ALLEGATIONS THAT APPELLEE WAS VIOLATING FEDERAL DISCHARGE PERMIT AND 33 U.S.C.A. §1311?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

EDWARD DOBREFF and BARBARA DOBREFF, his wife, Jointly and Severally,
Appellants,

v.

TOWNSHIP OF HARRISON, a Michigan municipal corporation,
Appellee.

JURISDICTIONAL STATEMENT -- STATE CIVIL CASE

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Michigan was made and entered on January 31, 1984. Thejurisdiction of this court is invoked under 28 U.S.C. §1257(2).

OPINIONS BELOW

The opinions of the Michigan Supreme Court denying the Motion for Rehearing on January 31, 1984, and denying application for leave to appeal entered on October 27, 1983, the

opinion of the Michigan State Court of Appeals entered on April 22, 1983, affirming the decision of the Circuit Court for the County of Macomb, Michigan granting summary judgment against Appellants made on September 17, 1981, and entered on October 13, 1981, are set out in the appendix hereto. The decisions were not published.

JURISDICTION

This action for issuance of an injunction to compel hooking up to Appellee's sewage system draws in question the validity of the Harrison Township sewer ordinance, Art. 2, No. 14 §4 on the ground that the statute invoked is repugnant to the Water Pollution and Control Act, 33 U.S.C.A. §1311 and the Michigan Environmental Protection Act, M.C.L.A. §691.1203 by allowing townships to continue to compel additional persons to hook up to a sewage system that is operating in violation of a federal discharge permit by discharging pollutants into navigable

waters at levels exceeding those authorized by the federal discharge permit. This action also draws in question whether a trial court can grant summary judgment against Appellants on the grounds that Appellants can not make out a prima facie case under the Michigan Environmental Protection Act, M.C.L.A. §691. 1201 et seq. in spite of allegations by the Appellants that Appellee was discharging pollutants in violation of a federal discharge permit and the Watern Pollution Prevention and Control Act, 33 U.S.C.A. §1311 which requires state environmental protection acts to be more stringent or protective of the environment then the federal environmental acts.

The federal constitutional questions were timely raised by Appellants before the trial court granted summary judgment and has continuously been raised on appeal. On September 17, 1981, the Circuit Court for the County of Macomb granted summary judgment in favor of Appellee ruling that Appellants

lacked standing to raise the counterclaims and defenses based on alleged violations of the Water Pollution Prevention and Control Act, 33 U.S.C.A. §1311 and the Michigan Environmental Protection Act, M.C.L.A. §691.1203. On April 22, 1983, the Michigan Court of Appeals affirmed the decision of the trial court on the grounds that Appelle had standing to raise the defenses and counterclaims based on the federal and state environmental acts, but that Appellants could not possibly make out a prima facie case under the Michigan Environmental Protection Act, M.C.L.A. §691.1201 et seq. The Supreme Court of Michigan denied application for leave to appeal on October 27, 1983. A timely motion for reconsideration was filed by Appellants and denied by the Michigan Supreme Court on January 31, 1984. Notice of appeal to this court was timely filed on February 23, 1984.

The jurisdiction of this court to review the decision of the Supreme Court of the

State of Michigan on appeal is confereed by 28 U.S.C. §1257(2).

STATUTORY PROVISIONS INVOLVED

33 United States Code Annotated §1311 of the Water Pollution Prevention and Control Act, is set out in full in the Appendix hereto. In relevant part it states:

> Illegality of pollutant discharges except in compliance with law
>
> (a) Except as in compliance with this section and sections 1213, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.
>
> Timeable for achievement of objective
>
> (b) In order to carry out the objective of this chapter there shall be achieved --
>
> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meats the requirements of subparagraph (B) of this paragraph, which shall

require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

Michigan Compiled Laws Annotated Section 333.12753-54 states as follows:

333.12753 Connection to public Sanitary sewer; time

(1) Structures in which sanitary sewage originates lying within the limits of a city, village, or township shall be connected to an available public sanitary sewer in the city, village, or township if required by the city, village, or township.

(2) Structures in which sanitary sewage originates lying outside the limits of the city, village or township in which the available public sanitary sewer lies shall be connected to the available public sanitary sewer after the approval of both the city, village, or township in which the structure and the public sanitary sewer system lies and if required by the city, village, or township in which the sewage originates.

(3) Except as provided in subsection (4), the connection provided for in subsection (1) and (2) shall be completed promptly but not later than 18 months after the date of occurrence of the last of the following events or before the city, village, or township in which the sewage originates requires the connection:

(a) Publication of a notice by the governmental entity which operates the public sanitary sewer system of availability of the public sanitary sewer system in a newspaper of general circulation in the city, village, or township in which the structure is located.

(b) Modification of a structure so as to become a structure in which sanitary sewage originates.

(4) A city, village, or township may erect ordinances, or a county or district board of health, may adopt regulations to require completion of the connection within a shorter period of time for reasons of public health.

333.13754 Failure to connect to public sanitary sewer within specified time; notice; injunctions

(1) When the structure in which sanitary sewage originates is not connected to an available public sanitary sewer

system within the time specified in section 12753, the governmental unit in which the structure lies shall require the connection to be made immediately after notice, which may be by first class or certified mail to the owner of the property or by posting on the property.

(2) The notice shall give the approximate location of the public sanitary sewer system which is available for connection of the structure involved and shall advise the owner of the requirements and enforcement provisions of sections 12752 to 12758 and any applicable ordinance or regulation.

(3) Where a structure in which sanitary sewage originates is not connected to an available public sanitary sewer system within 90 days after the date of mailing or posting of the written notice, the governmental unit which operates the available sanitary sewer system may bring an action for a mandatory injunction or order in the district, municipal, or circuit court in the county in which the sttructure is situated to compel the owner to connect to the available sanitary sewer system immediately. The governmental unit may join any number of owners of structures situated within the governmental unit in the action to compel each owner to connect to an available sanitary sewer system immediately.

Michigan Compiled Laws Annotated Section 691.1203 states:

691.1203. Prima facie showing of pollution, rebuttal; affirmative defenses; burden of proof; weight of evidence; masters or referees; costs, apportionment

Sec. 3 (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act.

(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a record and a report of his findings to the court in the action.

(3) Costs may be apportioned to the parties if the interests of justice require. P.A.1970, No. 127, § 3, Eff. Oct. 1.

The Harrison Township Sewer Use Ordinance Number 104, Article II, Section 4, states:

> The owner of all houses, buildings or properties used for human occupancy employment, recreation, or other purposes, situated within the municipality and abutting on any street, ally or right-of-way in which there is now located or may in the future be located a public sanitary sewer of the municipality, is hereby reuiqred at his expense to install suitable toilet facilities therein, and to connect such facilities directly with the proper public sanitary sewer in accordance with the provisions of this ordinance, within ninety (90) days after date of written notice to do so, provided that said public sanitary sewer is within one hundred (100) feet of the property line.

STATEMENT OF CASE

Appellants, Edward Dobreff and Barbara Dobreff, appeal from a Final Order of the Supreme Court of the State of Michigan entered on January 31, 1984. Appellee's, the Township of Harrison's, October 26, 1977, Complaint sought an Order, pursuant to the Sewer Use Ordinance, art. 2, no. 14, §4, and M.C.L.A. 123.285; M.S.A. 5.2769(155), compelling Edward Dobreff and Barbara Dobreff

to connect to residences owned by them to Appellee's, Township of Harrison's, sanitary sewer system. The ordinance requires owners of buildings located in the municipality and used for human occupancy, employment, recreation, or other purposes, to connect to the proper public sanitary sewer system. M.C.L.A. 123.285; M.S.A. 5.2769(155) authorized a governmental agency operating a public sanitary sewer system to seek a mandatory injunction compelling the owenr of a structure in which sanitary sewage originates to connect to the system. See also M.C.L.A. 123.283(1); M.S.A. 5.2769(153)(1).

Appellants argued as an affirmative defense and as a counterclaim that Appellee feeds the sewage generated by its residents into the treatment system run by the City of Detroit; that Detroit's sytem is discharging pollutants into the nation's navigable waters at levels above those authorized by a discharge permit in violation of the Water Pollution Prevention and Control Act, 33

U.S.C.A. §1311; and that this violates Michigan's environmental protection act, M.C.L.A. 691.1202 et seq.; M.S.A. 14.528 (201) et seq. (M.E.P.A.).

Appellants attach a copy of an Order to Show Cause filed in the United States v. State of Michigan, in which the City of Detroit and the Township of Harrison were joined as defendants and were ordered to show cause why each should not be restrained from violating a federal discharge permit. Appellants contended that requiring them and other residents of plaintiff township to connect to plaintiff's sewer system would further violate M.E.P.A. because such a requirement has, or is likely to, pollute, impair or destroy the air, water or other natural resources by further burdening the already over-burdened Detroit sewer system. See M.C.L.A. 691.1203(1); M.S.A. 14.528(203)(1). Appellants requested in their counter-claim that the trial judge entere an Order restraining plaintiff from permitting or

compelling persons residing within its territorial limits to connect to plaintiff's sewage system. Appellants also contended that the Detroit sewage system in which Appellee feeds sewage into, had already imploded in the City of Fraser.

Appellee, Township of Harrison, filed a Motion for Summary Judgment on July 10, 1979. On September 17, 1981, the Honorable Raymond Cashen, for the Circuit Court for the County of Macomb, granted Plaintiff's Motion for Summary Judgment on the grounds that Appellants, Edward Dobreff and Barbara Dobreff lacked standing to raise the affirmative defenses and Counterclaim based on Michigan's Environmental Protection Act of 1970, M.C.L.A. 691.1201 et seq., and the Water Pollution Prevention and Control Act, 33 U.S.C.A. §§1251 et seq.

Appellants appealed to the Michigan Court of Appeals. The Michigan Court of Appeals affirmed the decision of the trial court. The Court of Appeals opined that the Appel-

lants, Edward Dobreff and Barbara Dobreff, did have standing and could use the Michigan Environmental Protection Act as defense or counterclaim. However, the Court of Appeals opinied that Appellants, Edward Dobreff and Barbara Dobreff, could not make out a prima facie case.

The Appellants, Edward Dobreff and Barbara Dobreff, filed leave to appeal to the Supreme Court of Michigan. Leave to Appeal was denied on October 27, 1983. Appellants filed a Motion for Rehearing. The Supreme Court of Michigan denied the Motion for Rehearing on January 31, 1984.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

This case presents the important question of whether a township can, pursuant to authority of a state statue and a township ordinance, compel persons to hook up and discharge into a sewage sytem which is

violating a Federal Discharge Permit and the Water Pollution Prevention and Control Act, 33 U.S.C.A. §1311 et seq. The issue is posed squarely in this case, because the Appellants, Edward Dobreff and Barbara Dobreff, alleged that Appellee, Harrison Township's, sewage s-stem is part of, and discharges into the Detroit Sewage System which is in violation of the Water Pollution Prevention and Control Act, 33 U.S.C.A. §1311 et seq. The question merits full briefing and plenary review because of the environmental and federal questions involved in Appellants' Complaints.

The allegations are supported by the fact that in United States v. State of Michigan, City of Detroit, et al., (civil action no. 771100, United States District Court for the Eastern District of Michigan, Southern Division) on or about September 11, 1977, the effluent limitations set by Detroit Federal Dischrage Permit was modified by a Consent Decree and an Order to Show Cause

was entered by the Court at the request of the United States, requiring the City of Detroit to show cause why it should not be restrained from violating its Federal Discharge Permit and the Consent Decree. The Township of Harrison was a party to the Consent Decree. Further, Appellants have alleged that the Detroit Sewage System, of which Appelle, Harrison Township's, sewage system feeds into is overburdened and unable to treat and transport present sewage levels and has already imploded in the City of Fraser.

The law is clear that no facility can discharge any pollutants into navigable waters until a Federal Discharge Permit is issued to the facility. 33 U.S.C.A. §1342 (a)(1)(5). Therefore, no township facility which discharges pollutants into navigable waters can compel persons to hook up and discharge sewage into a facility when the facility is violating the Federal Discharge

Permit. Issued permits are expressly conditi-ned upon compliance with secondary treatment effluent limitations or soch conditions as the administration deems necessary to carry out the provisions of the Act, 33 U.S.C.A. §1342(a)(91). It would appear that the Environmental Protection Act impliedly restricts the ability of a facility or township to compel persons to connect to a sewage system because the issuance of the permit, through which the facility can compel connection, is conditioned on compliance with the effluent standards. To the best of Appellants' knowledge, no Court has ruled on the issue of whether a township can continue to compel persons within its jurisdiction to connect to a sewage system that is in violation of a Federal Discharge Permit and the Water Pollution Prevention and Control Act.

The issue os of great importance because it involves monumental invironmental questions and interpretation of the Water Pollution Pre-

vention and Control Act of 1970, 33 U.S.C.A. §1311 and Michigan statutes. The issue has not been addressed by any other court, nor by this Court. The Court of Appeals for the State of Michigan did not address this issue in its opinion in this case. State laws which impede enforcement of the Water Pollution Prevention and Control Act, or realization of its objectives are invalid to that extent. United States v. Board of Harbor Commissioners, 73 F.R.D. 460 (D.C. Cal. 1977). See, Dwyer v. Ann Arbor, 79 Mich. App. 113, 261 N.W.2d 231 (1978). A state statute and a township ordinance, based on the state statute, are invalid to the extent each impedes enforcement or realization of the objectives of the Water Pollution Prevention and Control Act, 33 U.S.C.A. §1251 et seq. A township ordinance operating pursuant to state statute which continues to allow the township to compel additional persons to connect and discharge sewage into a facility

already in violation of its Federal Discharge Permit, and to therefore create greater violations of the Federal Discharge Permit, is invalid. Accordingly, the issue involves a substantial question which should be reviewed.

II.

The second issue raised also involves a substantial question. Whether a violation of the Federal Discharge Permit and/or the Water Pollution Prevention and Control Act, 33 U.S.C.A. §1311 creates a prima facie violation and a prima facie case under the Michigan Environmental Protection Act of 1970 which is not subject to summary judgment. The issue is very substantial in that it involves an analysis of the relationship between the Water Pollution Prevention and Control Act, 33 U.S.C.A. §1311, and a supplemental state statute, The Michigan Environmental Protection Act, M.C.L.A. 691.1203.

The issue is posed squarely in this case because Appellants alleged a violation of a federal discharge permit and the Court granted summary judgment which was upheld by the Michigan Court of Appeals on the grounds that Appellants could not make out a prima facie case. The question merits full briefing and plenary review because of the environmental and federal questions involved in Appellants' appeal.

The Court of Appeals for the State of Michigan indicated in its opinion in this case that Appellants, Edward Dobreff and Barbara Dobreff, did have standing to raise defenses under the Michigan Environmental Protection Act, M.C.L.A. 691.1203. Since the state statutes use stricter guidelines than the federal environmental statutes do, it is inconceivable that a violation of a federal discharge permit would not create a prima facie case under the Michigan Environmental Protection Act. However, the

Court held that Appellants, Edward Dobreff and Barbara Dobreff, could not make out a prima facie statute under the Michigan Environmental Protection Act, in spite of allegations that Appellee, Harrison Township, was in violation of a Federal Discharge Permit and the Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1311 by discharging pollutants into navigable waters in excess of the discharge standards set by the Federal Discharge Permit.

The law is clear that states can only adopt environmental standards which are more stringent than the federal standards. Metropolitan Sanitary District of Greater Chicago v. United States Steel Corporation, 30 Ill. App. 3d 360; 332 N.E.2d 426 (1975) cert. denied 424 U.S. 926 (1975). The Michigan Environmental Protection Act of 1970 is much more stringent than the federal environmental acts in that "plaintiff in the action has made a prima facie showing that

the conduct of the defendant has or is likely to pollute, impair or destroy the air, water or other natural resources." M.C.L.A. 691.1203. A violation of a federal water discharge permit would clearly make out a prima facie case under the Michigan Environmental Protection Act of 1970.

The issue is of great importance because it involves monumental environmental questions and interpretation of the Water Pollution Prevention and Control Act, 33 U.S.C.A. §1251 et seq. and Michigan statutes. The issue has not been addressed by any other Court, nor by this Court. The Court of Appeals for the State of Michigan did not explicitly address the issue in its opinion. The issue deserves further review by this Court.

CONCLUSION

The decision below should be summarily reversed. Appellants' counterclaims and defense set up valid federal issues not

subject to summary judgment. Appellants' arguments that the Appellee can not compel persons to hook up to a sewage system which is operating in violation of a federal discharge permit; under which the use of the permit is conditioned upon compliance with the effluent limitations set forth therein, creates a valid defense. Clearly, the alleged fact that Appellee is operating in violation of a federal discharge permit would create a prima facie case under the Michigan Environmental Protection Act. Alternatively, this appeal should be given plenary review.

Respectfully submitted,

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DATED:April 21, 1984

APPENDIX

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 31st day of January in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable

71678(43)

G. MENNEN WILLIAMS
Chief Justice

THOMAS GILES KAVANAUGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

TOWNSHIP OF HARRISON, a Michigan municipal corporation,

Plaintiff-Appellee,

v

SC: 71678
COS: 61311

EDWARD DOBREFF and BARBARA J. DOBREFF, his wife, jointly and severally,

Defendants-Appellants.

On Order of the Court, the motion by defendants-appellants for reconsideration of this Court's order of October 27, 1983, is considered, and the motion is DENIED, because it does not appear that said order was entered erroneously.

(RECEIVED STAMP
10:45 February 1,
1984
WARREN OFFICE)

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at

(SEAL)

Lansing this 31st day of January in the year of our Lord one thousand nine hundred and eighty-four.

/s/Corbin R. Davis,Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 27th day of October in the year of our Lord one thousand nine hundred eighty-three.

Present the Honorable

G. MENNEN WILLIAMS
Chief Justice

THOMAS GILES KAVANAUGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES M. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

71678

TOWNSHIP OF HARRISON,
a Michigan municipal corporation,

Plaintiff-Appellee,

v

SC: 71678
COA: 61311
LC: 77-7242-CZ

EDWARD DOBREFF and BARBARA DOBREFF, his wife, jointly and severally,

Defendants-Appellants.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

1013

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at

(SEAL)

Lansing this 27th day of October in the year of our Lord one thousand nine hundred and eighty-three.

/s/Corbin R. Davis,Clerk

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TOWNSHIP OF HARRISON, a Michigan municipal corporation,

Plaintiff-Appellee,

-v-

EDWARD DOBREFF and BARBARA DOBREFF, his wife, jointly and severally,

Defendants-Appellants.

(APR 22 1983)

No. 61311

BEFORE: M. H. Wahls, P.J., M. J. Kelly and N. J. Lambros*, JJ.

PER CURIAM

Defendants appeal as of right from an October 14, 1983 judgment of the trial court ordering them to connect their two residences located within the plaintiff township to plaintiff's sanitary sewer system.

Plaintiff's October 26, 1977 complaint sought an order pursuant to its Sewer Use Ordinance, art 2, no. 14 § 4, and MCLA

*Circuit Judge, sitting on the Court of Appeals by assignment.

123.285; MSA 5.2769(155)[1], compelling defendants to connect two residences owned by them to plaintiff's sanitary sewer system. The ordinance requires owners of buildings located in the municipality and used for human occupancy, employment, recreation, or other purposes, to connect to the proper public sanitary sewer system. MCLA 123.285; MSA 5.2769(155) authorized a governmental agency operating a public sanitary sewer system to seek a mandatory injuncti-n compelling the owner of a structure in which sanitary sewage originates to connect to the system. See also MCLA 123.283(1); MSA 5.2769(153)(1).

Defendants subsequently argued, as an affirmative defense and as a counterclaim, that plaintiff feeds the sewage generated by its residents into the treatment system run by the City of Detroit; that Detroit's system is discharging pollutants into the nation's navigable waters at levels above those authorized

by a discharge permit in violation of the Water Pollution Prevention and Control Act, 33 USCA §§ 1251 et seq.; and that this violates Michigan's environmental protection act, MCLA 691.1201 et seq.; MSA 14.528(201) et seq. (MEPA).

Defendants contended that requiring them and other residents of plaintiff township to connect to plaintiff's sewer system would further violate MEPA because such a requirement has, or is likely to, pollute, impair or destroy the air, water or other natural resources by further burdening the already over-burdened Detroit sewer system. See MCLA 691.1203(1); MSA 14.528(203)(1). Defendants requested in their counterclaim that the trial judge enter an order restraining plaintiff from permitting or compelling persons residing within its territorial limits to connect to plaintiff's sewage system.

Plaintiff moved for summary judgment, alleging that defendants failed to state a

valid defense and that there is no genuine issue of material fact. GCR 1963, 117.2(2), (3). The trial judge granted the motion, holding that defendants lacked standing to raise their counterclaim. In so holding, the trial judge reasoned that the requested relief in the form of the injunction against further connections would not redress the claimed injury of pollution of navigable waters because the injunction could only have a minimal impact. Citing Duke Power Co v Caroline Environmental Study Group, Inc, 438 US 59, 72; 98 S Ct 2620; 57 L Ed 2d 595 (1978).

We believe that the trial judge reached the correct result albeit for the wrong reason. See Washtenaw County Health Department v T & M Chevrolet, Inc, 406 Mich 518, 520; 280 NW2d 822 (1979).

Section 2 of MEPA provides:

"(1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership,

corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." MCLA 691.1202(1); MSA 14.528(202)(1).

Thus, the trial judge erred in ruling that defendants lacked standing to raise their counterclaim, because MEPA grants private citizens standing to sue to protect the air, water and other natural resources without regard to the traditional requirements for standing. See Eyde v State of Michigan, 393 Mich 453, 454; 225 NW2d 1 (1975).

Plaintiff argues that there is no provision in MEPA allowing parties to use that act in a defensive posture. Although it is true that nothing in the MEPA specifically provides for use of the act as an affirmative defense or a counterclaim, it is obvious that a party can raise the act defensively where the party feels that the conduct the plaintiff seeks to compel violates that act. See GCR 1963, 203.2.

The Court in Eyde, supra, suggested such a result when, in ruling that the plaintiffs were not barred from raising their MEPA claim by their failure to raise it in the context of a related condemnation action, it stated:

> "At the time of trial the EPA had only recently become law. It is not surprising that the plaintiffs, lacking an understanding that they might raise an EPA issue in a condemnation proceeding, did not do so." 393 Mich at 456.

The Court clearly assumed that the plaintiffs could have raised their MEPA claim in the condemnation action.

Moreover, the fact that MCLA 333.12751 et seq.; MSA 14.15(12751) et seq. of the Public Health Code evince a public policy in favor of requiring connection to public sanitary sewer systems and against septic tank disposal systems does not preclude use of MEPA to enjoin such connections where the act of connecting to the public sewer system is likely to pollute, impair or destroy air, water or other natural resources. The Supreme Court has held that MEPA should be read in pari materia with other statutes relating to natural

resources. Michigan Oil Co v Natural Resources Commission, 406 Mich 1, 33; 276 NW2d 141 (1979). In addition, in Oscoda Chapter of PBB Action Committee, Inc v Department of Natural Resources, 403 Mich 215, 230; 268 NW2d 240 (1978), the Court made it clear that, despite a statute which authorized burial of PBB-contaminated cattle, a court could intervene under MEPA to prevent burial, if the plaintiff could make out a prima facie case of a MEPA violation as a result of the burial.

Section 3 of MEPA provides:

"(1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairmentor destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this Act." MCLA 691.1203(1); MSA 14.528(203)(1).

In construing this provision, the Supreme Court held:

"A court is not empowered to prevent any conduct, whether originally proposed or alternative, which does not rise to the level of environmental risk proscribed by the environmental protection act. The standard, 'has,or is likely to pollute, impair or destroy', is a limitation as well as a grant of power."

Oscoda PBB Action Committee, supra, pp 232-233 235-236.

Thus, while we find the defendants had standing to raise the defense set forth in their pleadings, we nevertheless feel the decision of the trial court was appropriate. Defendants could not possibly make out a prima facie case under MEPA, because the adverse environmental impact caused by allowing plaintiff to continue to permit or require residents to connect with plaintiff's sewer system would be minimal. See Whittaker & Gooding Co v Scio Township, 117 Mich App 18, 29; 323 NW2d 574 (1982).

Affirmed.

/s/ Myron H. Wahls
/s/ Michael J. Kelly
/s/ Nicholas J. Lambros

FOOTNOTES

1. MCLA 123.285; MSA 5.2769(155) was repealed by PA 1978, no. 368, Eff. September 30, 1978. The section, however, is embodied nearly verbatim in MCLA 333.12754(3); MSA 14.15(12754)(3).

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

TOWNSHIP OF MACOMB, a Michigan municipal corporation,

Plaintiff,

-vs- No. 77-7242 CZ

EDWARD DOBREFF and BARBARA J. DOBREFF, his wife, jointly and severally,

Defendants.
_____/

OPINION

OF THE COURT

This matter is before the Court upon plaintiff's motion for summary judgment under GCR 1963, 117.2(3). Defendant has counterclaimed pursuant to GCR 1963, 118.1, against the original complaint and as an affirmative defense. The summary judgment motion and the counterclaim arise from Harrison Township's (plaintiff) attempts to compel defendant, Edward Dobreff, to connect his residential sanitary system to that of the Township.

On October 26, 1977, Harrison Township filed its complaint seeking injunctive relief to require defendant to connect his residential sanitary sewer in the Township system. The Township's action was based on their Sewer Use Ordinance No. 104 which provides in Art. 11, § 4, thereof:

> "The owner of all houses, buildings, or properties used for human occupancy, employment, recreation, or other purposes, situated within the municipality and abutting on any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary sewer of the municipality, is hereby required at his expense to install suitable toilet facilities therein, and to connect such facilities directly with the proper public sanitary sewer in accordance with the provisions of this ordinance, within ninety (90) days after date of written notice to do so, provided that said public sanitary sewer is within one hundred (100) feet of the property line."

The Township based their authority to promulgate the above ordinance as MCLA § 123.285, which provides:

> "Where any structure in which sanitary sewage originates is not connected to an available public sanitary sewer system within 90 days after the date of mailing or posting of the written notice, the governmental agency which operates the available sanitary sewer system may bring an action for a mandatory injunction or order in the district, municipal or circuit court in the county in which the structure is situated to compel the owner to connect to the available sanitary sewer system forthwith. The governmental agency in 1 or more of such actions may join any number of owners or structures situated within the governmental unit to compel each owner to connect to available sanitary sewer system forthwith."

This act was repealed and superceded by P.A. 1978, No. 368 (§ 12753 and 12754 inparticular), effective September 30, 1978. (now MCLA 333.12753 and 333.12754--Appendix 1) The above provision is embodied nearly vebatim in MCLA 333.12754(3) (see Appendix).

Defendant uses three arguments in attempting to avoid connection to the Township sewer system. The first contention is that neither MCLA § 123.285 (the "old" act) nor MCLA 333.12751 et seq., (the present act)

EDITOR'S NOTE

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conferpower upon the Township to promulgate or enforce its Ordinance No. 104. Second, defendant alleges that the Township did not follow the procedural requirements of either the present act or the old act in compelling defendant to connect to the system, e.g., notice or publication. Thirdly, defendant has counterclaimed arguing that a per se violation of several environmental protection acts by the Detroit Waste Water Treatment Facility (a system of which the Township is a part), requires that this Court restrain plaintiff from compelling future sewer line connections. Defendant's arguments will be detailed and discussed seriatim.

Defendant's first argument is that the Township was without authority to enforce the provisions, or even prolulgate, Ordinance No. 104. It is alleged that the authority to establish such powers in the Township, if any exist at all, must be located in the Solid Wate, Refuse, Garbage, Night Soil, and Storm

Water Act of 1927, MCLA 123.271 et seq. The latter act must then be read in conjunction with the general public powers conferred upon townships by MCLA 41.181. Without benefit of further citation and explanatory argument, this Court cannot accept this statement. It appears that the Township was clearly within its rights to promulgate and enforce Ordinance No. 104.

MCLA 41.181 provides in pertinent part:

> "The township board of a township may...adopt ordinances regulating the public health, safety, and general welfare of persons and property-.."

The disputed authority granting provisions* (MCLA §§ 333.12751 et seq.) were part of the Public Health Code, P.A. 1978, No. 368. That Act was an attempt to codify, revise, consolidate and classify all laws relating to

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*This Court will concern itself principally with the provisions of the "new" act even though the action was originally brought under the "old" act. Defendant seems to argue in his brief that the new act must comply. No reasion to draw a distinction is necessary since the acts are substantially the same.

public health. Obviously, a matter so basic as "environmental health" would be a principle part of the Act. Equally obvious is the relationship between environmental regulation and exercise of the enforcement powers at the local level. This concept was accepted by the United States Supreme Court in Hutchinson vs. Valdosta, 227 US 303; 33 S Ct 290; 57 LEd 520 (1913) where the Court stated:

> "It is the commonest exercise of the police power of a state or city to provide for a system of sewers and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties."

The Michigan Court of Appeals, citing Hutchinson, has also endorsed this rationale, stating that the police power of a state allows this type of sewer regulation with no compensation to property owners. Township of Bedford vs. Bates, 62 Mich App 715, 717; 233 NW2d 706 (1975). Thus courts have upheld compelling a sewer connection, without compensation, even if the existing system is adequate -- with

failure to do so subject to criminal penalties. Township of Bedford, supra.

The current statutory provisions state the public policy behind the present laws and leave little doubt that the Township can compel the connection. Note MCLA 333.12752:

> "Public sanitary sewer systems were essential to the health, safety, and welfare of the people of the state. Septic tank disposal systems are subject to failure due to soil conditions or other reasons. Failure or potential failure of septic tank disposal systems poses a threat to the public health, safety, and welfare; presents a potential for ill health, transmission of disease, mortality, and economic blight; and consitutes a threat to the equality of surfac- and subsurface waters of this state. The connection to available public sanitary sewer systems at the earliest, reasonable date is a matter for the protection of the public health, safety, and welfare and necessary in the public interest which is declared as a matter of legislative determination."

MCLA §333.12758 provides further:

> "(2) Sections 12752 to 12758 are in addition to and not in limitation of the power of a governmental unit to adopt, amend, and enforce ordinances relating to the connection of a structure in which sanitary sewage originates to its public sanitary system."

The legislative intent is clear. The act is not to be construed as a limitation on the power of municipal governments to compel connection to the sewer systems. Rather, the statute sets up the justification, procedure, and overall guidelines to be followed. The Township's action was firmly grounded upon a legislative and judicial base from which it could force defendant to connect to the sanitary sewer system.

Defendant alleges next that the procedural requirements of the present statutory provision and/or the old provision have not been met. Specifically, defendant contends that no publication in a newspaper of general circulation was made relative to the availability of the sewer system as required by MCLA § 333.12753(3)(a) [Appendix]. Defendant also argues that the Township did not allow 90 days to expire after the mailing of notice to the defendant to bring the action for injunctive relief, pursuant to MCLA § 333.12754 (3) [Appendix]. These contentions are clearly

thout merit, as was demonstrated in plaintiff's affidavit filed pursuant to the motion for summary judgment, GCR 1963, 117.2(3) and 117.3. Defendant has filed no counter-affidavit as allowed by GCR 117.3.

Plaintiff's affidavit laid out the basic factual matters (i.e., names, addresses, lots involved and location) and the following chronology of events. The affidavit was submitted by the Superintendent of the Harrison Township Sewer and Water Department. It stated that notice was sent to defendants on May 1, 1974 requiring connection to the system. The defendants made application to connect one of the two lots involved on D-cember 31, 1974 and paid a capital charge and inspection fee. On April 23, 1976, notice was served on defendants that the still has not complied with Ordinance No. 104 and were consequently in violation thereof. There was a finding of violation of said ordinance by the Mount Clemens 41st District

Court on May 23, 1977. The affidavit ended by stating that the defendant had not complied with the ordinance.

The original complaint before this Court was filed October 26, 1977. It is difficult for this Court to see how any measure of the 90 day time span can be said to be inadequate to satisfy the dictates of the statute, using the dates presented in the affidavit. More than 90 days elapsed between the two notices sent to the defendants, and again before the claim for enforcement in the 41st District Court. The fact that the defendant admits making application for one permit on December 31, 1974, seems to indicate an intention to comply with Ordinance No. 104.

Defendant's other assertion relating to the publication requirement was satisfied by publicati-n in the Macomb Daily. The ordinance here in dispute was published on May 24, 1968. This was done in compliance with the "old" act and also meets the requirements of the new act under MCLA § 333.12753 (3)(a). This Court finds no other significant

erration from the procedural requirements of MCLA § 333.12751 et seq. The Township was exercising a statutorily created power and made every effort to comply with the procedural scheme.

The third avenue of argument taken by the defendant was by way of his counterclaim. In essence, the counterclaim asserts that the Township was a party to a consent decree[1] limiting the quantitative and qualitative discharge of pollutants by the Detroit Waste Water Treatment facility into the navigable water of the United States. That because the latter system, of which the Township is part, continues to violate the provisions for the consent decree[2], it is in violation of the Water Pollution Prevention and Control Act,

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(1) United States vs. Michigan, et al, Civil Action No. 77-1100; September 11, 1977 (ED Mich, 1977).

(2) Id., Show Cause Why City of Detroit Should not be Compelled to Immediately Comply with Court Judgment, October 18, 1978.

USCA § 1251 et seq., and Michigan's Environmental Protection Act of 1970, MCLA § 691.1201 et seq. Because of these continuing violations, defendant's counterclaim seeks an order restraining the Township from compelling persons within its' territorial limits to connect their residences to the Township (and ultimately Detroit) system.

Defendant's contention is improperly before this Court due to the capacity in which it is brought. GCR 1963, 201.2 requires that every actionbe prosecuted in the name of the real party in interest. Real party in interest, analagous to the general term standing, is the legal term used to denote the existence of a party's interest in the outcome of the litigation, an interest that will insure sincere and vigorous advocacy. Sierra Club vs. Morton, 405 US 727; 92 S Ct 1361; 31 L Ed 2d 636 (1972). As the court in Sierra Club noted:

> "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. * * * [T]he question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy.' Baker vs. Carr, 369 US 186, 204, 82 S Ct 691, 703, 7 L Ed 2d 663, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' Flast vs. Cohen, 392 US 83, 101, 88 S Ct 1942, 1953; 20 L Ed 2d 947."

The threshold question, as stated in Michigan License Beverage Assoc. vs. Behnan Hall, Inc., 82 Mich App 319, 266 NW 2d 808 (1978) is whether plaintiff (counter-plaintiff in the instant case) has an interest in the outcome of the litigation sufficient to invoke the controversy resolving powers of the judiciary. Defendant in the instant case does not. Mr. Dobreff hasneither a direct interest in the cause of action nor a properly constituted representative position, and, therefore, fails to attain the requisite standing required to pursue the counterclaim.

With the above "Michigan definition" of standing in mind, it is necessary to demonstrate why defendant lacks adequate standing. Michigan courts have followed federal courts in developing requirements which will be met before a party has standing to sue. For personal standing the party seeking such status must make a twofold showing: first, the party must show a distinct and palpable injury to itself, and second, a fairly traceable casual connection between the claimed injury and the challenged conduct. Duke Power Co. vs. Carolina Environmental Study Group, 438 US 59, 78; 98 S Ct 2720; 67 L Ed 2d 595 (1978). A party can meet the latter prong of the requirements by showing there is a substantial likelihood that the relief requested of the court will redress the claimed injury. Duke Power Co., supra, p. 72.

The question in the instant case is whether an injunction against further connections in Harrison Township (the requested relief) will redress the claimed injury

pollution of navigable waters). The answer is obviously "no". Any impact such an injunction would have would be at best de minimus. The injunction would only prevent the Township from enforcing an ordinance which it was legitimately empowered to enforce by the Michigan Legislature.

Defendant alleges only in conclusory terms that he has been personally injured. As part of the general public defendant has asserted a generalized grievance against the Township, a party who is only one of 81 communities contributing to the Detroit Waste Water Treatment System. Standing in a case involving a private citizen and a governmental agency has been consistently limited in Michigan. Home Telephone Co. vs. Michigan Railroad Commission, 174 Mich 219; 140 NW 496 (1913)[3]. In that case the court stated

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[3] see also: Comstock vs. Wheelock, 63 Mich App 195; 234 NW 2d 448 (1975). Fortin vs. Vitali, 15 Mich App 657; 167 NW 2d 355 (1969).

that private persons cannot redress grievances on behalf of the public. Only in cases where theindividual's grievance is distinct from other members of the public can that individual proceed to judicial relief. Otherwise, the task falls to those who have been specifically charged with the duty. People, ex rel. Stream Control Commission vs. City of Port Huron, 305 Mich 153, 9 NW 2d 41 (1943), injunction granted, 323 Mich 541, 36 NW 2d 138 (1949).

Defendant's position in bringing the counterclaim is, therefore, very tenuous. Defendant has only a generalized grievance with no concrete injury to himself as an individual apart from the public in general. There is no substantial likelihood that the relief will redress the grievance which defendant claims is the substance of his action. In short, defendant is not the real party in interest.

To allow such suits would result in a multiplicity of actions bearing on the same

sue. Defendant's requested relief would have an insignificant effect on any pollution and is directly contrary to the Legislature's express intent. The Federal Courts are litigating the issue and can deal with the entire problem. Michigan Courts have been in favor of limiting the number of persons who may maintain an action for abatement of a nuisance to only those who have a substantial interest. White Lake Improvement Assoc. vs. Whitehall, 22 Mich App 262; 177 NW 2d (1970). The principle is analogous to the instant situation and extremely pertinent.

This Court will not consider defendant's counterclaim for the reasons given above. In the face of an express public policy in favor of such connections, this Court is even more loathe to consider it. The defeat of that public policy in the instant case would only serve as impetus to litigation and the further eroding of a valid public policy objective.

Summary judgment motions under GCR 117.2(3) are routinely evaluated under criteria set forth in Bob vs. Holmes, 78 Mich App 205, 210-211; 259 NW 2d 427 (1978). Only when defendant's defenses are so clearly unenforceable as a matter of law that no factual development can justify interposition against a claim will such motions be granted. In view of plaintiff's affidavit and theunrebutted statements contained therein, and the overwhelming statutory/case authority present on the side of the plaintiff, this Court has no alternative but to grant plaintiff's motion for summary judgment pursuant to GCR 1963, 117.2(3). Lacking standing to pursue the counterclaim, defendant's ability to maintain this action is absent.

In view of the foregoing opinion, defendant is ordered to comply with Harrison Township's Ordinance No. 104 and connect the two residences to the Township sanitation system. An order in conformity with this

opinion will enter upon notice and presentment.

/s/
RAYMOND R. CASHEN
Circuit Court Judge

Dated: September 17, 1984
cc: John Bruff, Atty for Pltf
Emil Cardamone, Atty for Defts

APPENDIX I

333.12753 Connection to public Sanitary sewer; time

/ (1) Structures in which sanitary sewage originates lying within the limits of a city, village, or township shall be connected to an available public sanitary sewer in the city, village, or township if required by the city, village or township.

(2) Structures in which sanitary sewage originates lying outside the limits of the city, village, or township in which the available public sanitary sewer after the approval of both the city, village, or township in which the structure and the public sanitary sewer system lies and if required by the city, village, or township in which the sewage originates.

(3) Except as provided in subsection (4), theconnection provided for in subsections (1) and (2) shall be completed promptly but not later than 18 months after the date of occurrence of the last of the following events or before the city, villate, or township in which the sewage originates requires the connection:

(a) Publication of a notice by the governmental entity which operates the public sanitary sewer system of availability of the public sanitary sewer system in a newspaper of general circulation in the city, village, or township in which the structure is located.

(b) Modification of a structure so as to become a structure in which sanitary sewage originates.

(4) A city, village, or township may enact ordinances, or a county or district board of health, may adopt regulations to require completion of the connection within a shorter period of time for reasons of public health.

333.12754 Failure to connect to public sanitary sewer within specified time; notice; injunctions

(1) When the structure in which sanitary sewage originates is not connected to an available public sanitary sewer system within the time specified in section 12753, the governmental unit in which the structure lies shall require the connection to be made immediately after notice, which may be by first class or certified mail to the owner of the property or by posting on the property.

(2) The notice shall give the approximate location of the public sanitary sewer system which is available for connection of the structure involved and shall advise the owner of the requirements and enforcement provisions of sections 12752 to 12758 and any applicable ordinance or regulation.

(3) Where a structure in which sanitary sewage originates is not connected to an available public sanitary sewer system within 90 days after the date of mailing or posting of the written notice, the governmental unit which operates the available sanitary sewer system may bring an action for a mandatory injunction or order in the district, municipal, or circuit court in the county in which the structure is situated to compel the owner to connect to the available sanitary sewer system immediately. The governmental unit may

join any number of owners of structures situated within the governmental unit in the action to compel each owner to connect to an available sanitary sewer system immediately.

STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal From the Court of Appeals (No. 61311)

IN THE MATTER OF:

EDWARD DOBREFF AND BARBARA J. DOBREFF, His Wife, Jointly and Severally,

Appellant,

v.

Supreme Ct. No. 71678

TOWNSHIP OF HARRIGON, A Michigan Municipal Corporation,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

BY: EDWARD DOBREFF (P12819)

Appearing in Pro Per
30500 Van Dyke
Suite 301
Warren, Michigan 48093

(313) 573-7050

STATE OF MICHIGAN

IN THE SUPREME COURT

IN THE MATTER OF:

EDWARD DOBREFF AND BARBARA J. DOBREFF, His Wife, Jointly and Severally,

Appellant,

v.

Supreme Ct. No. 71678

TOWNSHIP OF HARRISON, a Michigan Municipal Corporation,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that EDWARD DOBREFF and BARBARA J. DOBREFF, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final Order of the State of Michigan, denying Motion for Rehearing, entered herein on January 31, 1984.

This Appel is taken pursuant to 28 U.S.C. §1257 (2).

EDWARD DOBREFF (P12819)
In Pro Per
30500 Van Dyke
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Warren, Michigan 48093

(313) 573-7050

Dated: February 23, 1984